

INSURANCE DIVISION[191]

Notice of Intended Action

Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”

Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.

Pursuant to the authority of Iowa Code section 523I.207, the Insurance Division (the Division) hereby gives Notice of Intended Action to rescind Chapter 18, “Cemeteries,” and to adopt new Chapter 140, “Burial Sites and Cemeteries,” Iowa Administrative Code.

New Chapter 140 is promulgated to implement and administer the provisions of Iowa Code chapter 523I, which regulates burial sites and cemeteries.

The new chapter addresses the assessment of expenses for examinations of cemeteries pursuant to Iowa Code section 523I.213A, notices of disinterments of remains filed pursuant to Iowa Code section 523I.309, sales practices by cemeteries that constitute the sale of insurance, and a total return method of distributing perpetual care trust fund income to perpetual care cemeteries. The Division intends that these rules shall become effective January 1, 2014, and that burial sites and cemeteries must be in compliance with the adopted rules beginning January 1, 2014.

Any interested person may make written suggestions or comments on these proposed amendments on or before September 27, 2013. Such written comments should be directed to Dennis Britson, Iowa Securities Bureau, Iowa Insurance Division, Two Ruan Center, 601 Locust Street, Fourth Floor, Des Moines, Iowa 50309-3738; fax (515)281-3059; e-mail dennis.britson@iid.iowa.gov.

Also, there will be a public hearing on September 24, 2013, at 10 a.m., at the offices of the Insurance Division, Two Ruan Center, 601 Locust Street, Fourth Floor, Des Moines, Iowa, at which time persons may present their views about the amendments either orally or in writing. At the hearing, persons will be asked to give their names and addresses for the record.

Any person who intends to attend the public hearing and who has special requirements, such as those relating to hearing or mobility impairments, should contact the Division and advise of specific needs.

The proposed rules are subject to waiver consistent with the waiver provisions provided in 191—Chapter 4.

After review and analysis of this rule making, no impact on jobs has been found.

These amendments are intended to implement Iowa Code chapter 523I.

The following amendments are proposed.

ITEM 1. Rescind and reserve **191—Chapter 18**.

ITEM 2. Adopt the following **new** 191—Chapter 140:

CHAPTER 140

BURIAL SITES AND CEMETERIES

191—140.1(523I) Purpose. This chapter is promulgated to implement and administer the provisions of Iowa Code chapter 523I, which regulates burial sites and cemeteries.

This rule is intended to implement Iowa Code sections 523I.201 and 523I.207.

191—140.2(523I) Definitions. For purposes of this chapter, the definitions of Iowa Code chapter 523I are incorporated by reference. In addition, the following definitions shall apply:

“*Act*” shall mean Iowa Code chapter 523I, the “Iowa cemetery Act.”

“*Bureau*” shall mean the securities and regulated industries bureau of the division.

“*Division*” shall mean the insurance division.

This rule is intended to implement Iowa Code section 523I.207.

191—140.3(523I) Administration.

140.3(1) *Contact information.* All mailed complaints and inquiries shall be sent to the Securities and Regulated Industries Bureau, Iowa Insurance Division, Two Ruan Center, 601 Locust Street, Fourth Floor, Des Moines, Iowa 50309-3738. Telephone inquiries may be made at (515)281-5705. E-mail correspondence may be made through the division's Web site, www.iid.state.ia.us.

140.3(2) *Complaints and inquiries.* The division may receive and process any complaint made regarding burial sites or cemeteries. Where appropriate, the division may refer complaints, in whole or in part, to other agencies. Any member of the public or the industry, or any federal, state, or local official, may make and file a complaint with the division. Complaints may be received from sources outside the state of Iowa and processed in the same manner as those originating in Iowa. If required by the division, complaints shall be made on forms prescribed by the division.

140.3(3) *Forms and filing procedures.*

a. Copies of all required forms and instructions for filing complaints, notices and annual reports are available on the division's Web site, www.iid.state.ia.us.

b. All filings of annual reports and notices shall be made as directed by the division. Instructions are available at the division's Web site, www.iid.state.ia.us.

This rule is intended to implement Iowa Code sections 523I.201 and 523I.207.

191—140.4(523I) Examination expenses assessment. The fee for an on-site examination of a perpetual care cemetery performed by the division pursuant to Iowa Code section 523I.213A is \$150. The fee will not be assessed more than once every five years. In addition, the division reserves the right to assess actual costs of staff time, travel, meals and lodging expenses in special circumstances, or for investigative examinations for cause, as often as necessary.

This rule is intended to implement Iowa Code sections 523I.202, 523I.207, and 523I.213A.

191—140.5(523I) Notice of disinterment. The notice filed by a cemetery reporting a disinterment pursuant to Iowa Code section 523I.309 shall include a description of the error, the reason the error occurred, the identity of all parties in interest, the date of the initial interment, the identity of the remains being relocated, the location where the disinterment will occur, and the location of the new interment space.

The division and parties in interest may waive the 60-day notice period if all parties in interest have received notice of the action and consented to the disinterment and relocation.

This rule is intended to implement Iowa Code sections 523I.207 and 523I.309.

191—140.6(523I) Sale of insurance. Any offer to provide merchandise or services in the event of the death of a person other than a purchaser or beneficiary named in the purchase agreement of cemetery and funeral merchandise and services is the sale of insurance and must be properly underwritten by an insurance company authorized to sell insurance in Iowa.

This rule is intended to implement Iowa Code sections 523I.207 and 523I.211.

191—140.7(523I) Commingling of perpetual care trust fund accounts.

140.7(1) Except as otherwise provided in subrules 140.7(2) and 140.7(3), the assets of a perpetual care trust fund may not be commingled with other perpetual care trust fund assets or with any other funds.

140.7(2) The assets of a perpetual care trust fund may be managed by a master trust managing funds from more than one cemetery.

140.7(3) The assets of a perpetual care trust fund may be commingled into other cemeteries' trust funds for investment purposes if separate title and separate accounting are maintained for each cemetery's individual perpetual care trust fund.

This rule is intended to implement Iowa Code sections 523I.207 and 523I.810.

191—140.8(523I) Distribution of capital gains using a total return distribution method.

140.8(1) The principal of a care fund is intended to remain available perpetually as a funding source for care of the cemetery. The principal of a care fund shall not be reduced voluntarily and shall remain inviolable, except for the distribution of income. This rule is intended to encourage investments in appreciating assets that will produce higher income levels created by growth in trust principal. Pursuant to Iowa Code section 523I.811(2), a trustee or, in the event of multiple trustees, a majority of the trustees, may, in the trustee's or trustees' sole discretion and without approval of the court, adopt a total return distribution method, subject to the terms and conditions of this rule.

a. The trust's governing instrument must clearly manifest intent to use a total return distribution method. Conversion to an investment policy utilizing the total return distribution method shall not conflict with or affect any provision of the trust agreement, if any, regarding the distribution of principal. If the trust agreement indicates intent that net appreciation shall not be expended, the trust may not use the total return distribution method unless the trust agreement is amended appropriately.

b. Distributions permitted under the total return distribution method shall be paid in the following order:

- (1) Net income as normally defined;
- (2) Other ordinary income as determined for federal income tax purposes;
- (3) Assets of the trust principal for which there is a readily available market value; and
- (4) Other trust principal.

c. A separate accounting of principal and income shall be maintained for the care fund.

d. The use of distributions under the total return distribution method shall continue to be governed by Iowa Code section 523I.811.

e. The trustee or trustees shall, not less than annually, determine the fair market value of each asset of the trust that consists primarily of real property or other property that is not traded on a regular basis in an active market, by appraisal or other reasonable method or estimate. That determination, if made reasonably and in good faith, shall be conclusive as to all persons interested in the trust.

140.8(2) The trustee or trustees shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision regarding the investment of trust funds. In so doing, the trustee or trustees shall consider present and anticipated financial requirements of the cemetery, including the following: the cemetery's need to fund the current expenses of care and maintenance and the cemetery's long-term need to fund the expenses of care and maintenance; expected total return from income and appreciation of principal; price level trends of equity and fixed income investments; needs for liquidity; regularity of income; preservation or appreciation of capital; general economic conditions; the possible effect of inflation or deflation; and the retention of income and net appreciation to adjust for inflation.

140.8(3) A notice of intent shall be filed with the division 90 days prior to implementation of the total return distribution method. The notice shall include a copy of the trust governing instrument and the written election adopting the total return distribution method.

140.8(4) The trustee or trustees must, prior to implementation of the total return distribution method, adopt a written investment and distribution policy under which future distributions from the trust will be total return distribution amounts rather than net income distribution amounts. A copy of the investment and distribution policy shall be filed with the notice required by subrule 140.8(3). The investment goals and objectives shall be to achieve the following: principal growth through equity investment; current income through income investments; and an appropriate balance between (1) maintaining purchasing power through principal appreciation and (2) generating current income to support the cemetery's current care and maintenance. The trustee or trustees shall treat the net appreciation, realized and unrealized, in the fair value of the assets of a care fund as if it were net income of the trust for purposes of determining the amount available for distributions, from time to time, from the care fund.

140.8(5) In addition to the annual report required by Iowa Code section 523I.813, a perpetual care cemetery using the total return distribution method shall file an annual report with the division about the trust, detailing the asset allocation, the annual payout, any changes in investment policy, an accounting in

regard to whether growth of the care fund's trust principal has exceeded an amount needed to compensate for inflation, and other pertinent information.

140.8(6) The division may limit or prohibit the distribution of capital gains in situations where investment returns and distribution practices have not resulted in sufficient protection of the care fund's trust principal from either a middle-term (three to five years) or long-term analysis. The division's review shall consider the presence and stated value of assets that do not have an active market and are not traded on a regular basis, the frequency of appraisals and evaluations, the asset allocation of the trust, and whether trust principal, as adjusted for inflation, is less than it was at the time the cemetery converted to the total return distribution method.

140.8(7) The annual payout shall not exceed the greater of the net ordinary income or 5 percent of the fair market value of the care fund as of the last day of the trust fiscal year immediately preceding the distribution year, unless approved by the division upon a showing of good cause. The determination of payout amounts shall take into consideration the cemetery's need to fund both the current and future expenses of care and the maintenance and preservation of principal. In determining the amounts to be paid out annually, the following factors shall be taken into account: the perpetual duration of the care fund; present and anticipated financial requirements; expected total return from income and appreciation of principal; price level trends of equity and fixed income investments; needs for liquidity; regularity of income; preservation or appreciation of capital; general economic conditions; the possible effect of inflation or deflation; and the retention of income and net appreciation to adjust for inflation.

140.8(8) The trustee or trustees shall maintain records documenting the net fair market values of the assets held in trust at the end of the accounting period immediately prior to adoption of the total return distribution method.

140.8(9) The fair market value of the trust shall be determined at least annually, using such valuation date or dates or averages of valuation dates as are readily ascertainable. Reasonable and appropriate valuation methods shall be utilized. As appropriate, assets may be excluded from valuation, provided all income received with respect to such assets is distributed to the extent distributable in accordance with the terms of the trust agreement.

140.8(10) The asset allocation of the care fund shall include a diversified portfolio, and investment decisions shall be made in accordance with Iowa Code section 633A.4302.

140.8(11) The division may limit or prohibit adoption of a total return distribution method by a care fund if the trustee or trustees and any investment manager are not able to demonstrate sufficient knowledge and expertise regarding effective implementation of the total return distribution method.

140.8(12) The election of use of a total return distribution method is irrevocable, unless a reversion is approved by the division. A notice shall be filed with the division 90 days prior to a proposed reversion from the total return distribution method to the traditional net income distribution method. The division may prohibit a reversion from the total return distribution method to the traditional net income distribution method if the trust principal, as adjusted for inflation, is less than it was at the time the cemetery converted to the total return distribution method.

This rule is intended to implement Iowa Code sections 523I.207 and 523I.811(2).